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U.S. Department of Homeland Security

Bureau of Citizenship and Immigration Services

ADMINISTRATIVE APPEALS OFFICE
425 Eye Street N.W.
BCIS, AAO, 20 Mass, 3/F
Washington, D.C. 20536

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

[redacted]

File: [redacted] Office: MANILA, PHILIPPINES Date: APR 25 2003

IN RE: Applicant: [redacted]

Application: Application for Permission to Reapply for Admission into the United States after Deportation or Removal under Section 212(a)(9)(A)(iii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(a)(9)(A)(iii) filed in conjunction with Application for Waiver of Grounds of Inadmissibility under Section 212(i) of the Act, 8 U.S.C. 1182(i), and section 212(a)(9)(B)(v) of the Act, 1182(a)(9)(B)(v)

ON BEHALF OF APPLICANT:

[redacted]

PUBLIC COPY

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. § 103.5(a)(1)(i).

If you have new or additional information that you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Bureau of Citizenship and Immigration Services (Bureau) where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. *Id.*

Any motion must be filed with the office that originally decided your case along with a fee of $110 as required under 8 C.F.R. § 103.7.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The applications were denied by the Officer in Charge, Manila, Philippines and are now on appeal before the Administrative Appeals Office (AAO). The AAO will withdraw the officer in charge's denial of the Form I-601 (Application for Waiver of Grounds of Inadmissibility) and will dismiss the appeal of the Form I-212 (Application for Permission to Reapply for Admission).

The applicant is a native and citizen of the Philippines who was found by a consular officer to be inadmissible to the United States under section 212(a)(9)(A)(ii) of the Act, 8 U.S.C. § 1182(a)(9)(A)(ii) for having been removed from the United States; under section 212(a)(6)(C)(i) of the Act, 8 U.S.C. § 1182(a)(6)(C)(i), for having procured admission into the United States by fraud or willful misrepresentation; and under section 212(a)(9)(B)(i)(II) for having been unlawfully present in the United States for one year or more.

The record indicates that the applicant was also found by the officer in charge to be inadmissible to the United States as an admitted member of a terrorist group under section 212(a)(3)(B)(i)(V) of the Act, 8 U.S.C. § 1182(a)(3)(B)(i)(V).

The applicant is married to a citizen of the United States and is the beneficiary of an approved petition for alien relative. He seeks permission to reapply for admission to the United States after deportation or removal and a waiver of grounds of inadmissibility in order to travel to the United States to reside.

In a single decision addressing both the Form I-212 and Form I-601 applications, the officer in charge denied the applications based on the applicant's failure to establish extreme hardship to a qualifying relative.

On appeal, counsel asserts that in denying the applicant's Form I-601 waiver request, the officer in charge failed to consider the totality of factors that constitute extreme hardship to the applicant's spouse who, among other things, has two children living with her. Counsel also asserts that the officer in charge erred in denying the applicant's Form I-212 application on the grounds that he was in total disregard of the immigration laws and had admitted membership in a terrorist organization. Counsel asserts that the applicant never committed a crime while in the United States and that he disclaimed and retracted his membership in the New People's Army (NPA) at the time of his consular interview.

On appeal, counsel stated that a brief and/or evidence would be forthcoming within 30 days after filing the appeal. The applicant's new counsel then requested an additional 45 days in which to submit a brief and/or evidence. Since more than ten months have passed and no new information or documentation has been received, a decision will be rendered based on the present record.

Section 212(a) of the Act states:

> CLASSES OF ALIENS INELIGIBLE FOR VISAS OR ADMISSION.-Except as otherwise provided in this Act, aliens who are ineligible under

[redacted]

the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * *

(3) SECURITY AND RELATED GROUNDS.-

* * *

(B) TERRORIST ACTIVITIES-

(i) IN GENERAL.- Any alien who-

* * *

(V) is a member of a foreign terrorist organization, as designated by the Secretary under section 219, which the alien knows or should have known is a terrorist organization, is inadmissible. . . .

* * *

(6) ILLEGAL ENTRANTS AND IMMIGRATION VIOLATORS.-

* * *

(C) MISREPRESENTATION.-

(i) IN GENERAL.-Any alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.

Section 212(i) of the Act states:

ADMISSION OF IMMIGRANT INADMISSIBLE FOR FRAUD OR WILLFUL MISREPRESENTATION OF MATERIAL FACT.-

(1) The Attorney General may, in the discretion of the Attorney General, waive the application of clause (i) of subsection (a)(6)(C) in the case of an alien who is the spouse, son, or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to the United States of such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such an alien.

(2) No court shall have jurisdiction to review a decision or action of the Attorney General regarding a waiver under paragraph (1).

(9) ALIENS PREVIOUSLY REMOVED.-

(A) CERTAIN ALIENS PREVIOUSLY REMOVED.-

(i) ARRIVING ALIENS.-Any alien who has been ordered removed under section 235(b)(1) or at the end of proceedings under section 240 initiated upon an alien's arrival in the United States and who again seeks admission within 5 years of the date of such removal (or within 20 years in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(ii) OTHER ALIENS.-Any alien not described in clause (i) who-

(I) has been ordered removed under section 240 of the Act or any other provision of law, or

(II) departed the United States while an order of removal was outstanding,

and who seeks admission within 10 years of the date of such alien's departure or removal (or within 20 years of such date in the case of a second or subsequent removal or at any time in the case of an alien convicted of an aggravated felony) is inadmissible.

(iii) EXCEPTION.-Clauses (i) and (ii) shall not apply to an alien seeking admission within a period if, prior to the date of the alien's reembarkation at a place outside the United States or attempt to be admitted from foreign continuous territory, the Attorney General has consented to the alien's reapplying for admission.

(B) ALIENS UNLAWFULLY PRESENT.-

(i) IN GENERAL.-Any alien (other than an alien lawfully admitted for permanent residence) who-

* * *

(II) has been unlawfully present in the United States for one year or more, and who again seeks admission within 10 years of the date of such alien's departure from the United States, is inadmissible.

* * *

> (v) WAIVER.-The Attorney General has sole discretion to waive clause (i) in the case of an immigrant who is the spouse or son or daughter of a United States citizen or of an alien lawfully admitted for permanent residence, if it is established to the satisfaction of the Attorney General that the refusal of admission to such immigrant alien would result in extreme hardship to the citizen or lawfully resident spouse or parent of such alien. No court shall have jurisdiction to review a decision or action by the Attorney General regarding a waiver under this clause.

Service instructions at O.I. 212.7 specify that a Form I-212 application will be adjudicated *first* when an alien requires both permission to reapply for admission and a waiver of grounds of inadmissibility. If the Form I-212 application is denied, then the Application for Waiver of Grounds of Inadmissibility (Form I-601) should be rejected, and the fee refunded.

The AAO withdraws the decision of the officer in charge to deny the Form I-601. The AAO notes that there is insufficient evidence contained in the record of proceeding, as it is presently constituted, to support the officer in charge's finding that the applicant is inadmissible to the United States under section 212(a)(3)(B)(i)(V) of the Act, in addition to the consular officer's findings of inadmissibility under sections 212(a)(9)(A)(ii), 212(a)(6)(C)(i) and section 212(a)(9)(B)(i)(II) of the Act.

Nothing could be clearer than Congress' desire in recent years to limit, rather than extend, the relief available to aliens who have who have committed a crime involving moral turpitude or have been present in the United States without a lawful admission or parole. Congress has almost unfettered power to decide which aliens may come to and remain in this country. This power has been recognized repeatedly by the Supreme Court. See *Fiallo v. Bell*, 430 U.S. 787 (1977); *Reno v. Flores*, 507 U.S. 292 (1993); *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972). *See also Matter of Yeung*, 21 I&N Dec. 610, 612 (BIA 1997).

Section 212(a)(6)(B) of the Act, 8 U.S.C. 1182(a)(6)(B), was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and is now codified as section 212(a)(9)(A)(i) and (ii). Section 212(a)(9)(A)(ii) of the Act provides that aliens who have been otherwise ordered removed, ordered deported under former sections 242 or 217 of the Act, 8 U.S.C. § 1252 or § 1187, or ordered excluded under former section 236 of the Act, 8 U.S.C. § 1226, and who have actually been removed (or departed after such an order) are inadmissible for 10 years.

The Service has held that an application for permission to reapply for admission to the United States may be approved when the applicant establishes he or she has equities within the United States or there are other favorable factors that offset the fact of deportation or removal at Government expense and any other adverse factors that may exist. Circumstances which are considered by the Service include, but are not

limited to: the basis for removal; the recency of removal; the length of residence in the United States; the moral character of the applicant; the alien's respect for law and order; the evidence of reformation and rehabilitation; the existence of family responsibilities within the United States; any inadmissibility to the United States under other sections of the law; the hardship involved to the alien and to others; and the need for the applicant's services in the United States. *Matter of Tin*, 14 I&N Dec. 371 (Reg. Comm. 1973). An approval in this proceeding requires the applicant to establish that the favorable aspects outweigh the unfavorable ones.

It is appropriate to examine the basis of a removal as well as an applicant's general compliance with immigration and other laws. Evidence of serious disregard for law is viewed as an adverse factor. *Matter of Lee*, 17 I&N Dec. 275 (Comm. 1978). Family ties in the United States are an important consideration in deciding whether a favorable exercise of discretion is warranted. *Matter of Acosta*, 14 I&N Dec. 361 (D.D. 1973).

In *Matter of Tin*, the Regional Commissioner held that unlawful presence is evidence of disrespect for law. The Regional Commissioner noted also that the applicant gained an equity (job experience) while being unlawfully present subsequent to that return. The Regional Commissioner stated that the alien obtained an advantage over aliens seeking visa issuance abroad or who abide by the terms of their admission while in this country. The Regional Commissioner then concluded that approval of an application for permission to reapply for admission would appear to be a condonation of the alien's acts and could encourage others to enter without being admitted to work in the United States unlawfully. Following *Tin*, an equity gained while in an unlawful status can be given only minimal weight.

The court held in *Garcia-Lopez v. INS*, 923 F.2d 72 (7th Cir. 1991), that less weight is given to equities acquired after a deportation order has been entered. Further, the equity of a marriage and the weight given to any hardship to the spouse is diminished if the parties married after the commencement of deportation proceedings, with knowledge that the alien might be deported. *Ghassan v. INS*, 972 F.2d 631 (5th Cir. 1992), *cert. denied*, 507 U.S. 971 (1993). It is also noted that the Ninth Circuit Court of Appeals in *Carnalla-Muñoz v. INS*, 627 F.2d 1004 (9th Cir. 1980), held that after-acquired equities, referred to as "after-acquired family ties" in *Matter of Tijam*, 22 I&N Dec. 408 (BIA 1998), need not be accorded great weight by the district director in considering discretionary weight.

The record reflects that the applicant initially entered the United States in 1993 with an altered passport and U.S. nonimmigrant visa. An immigration judge ordered the applicant excluded and deported from the United States, *in absentia*, on March 22, 1996. On June 13, 1998, the applicant married a native of the Philippines and naturalized citizen of the United States. The applicant's spouse filed a petition for alien relative on the applicant's behalf on October 7, 1998. The applicant was unlawfully present in the United States from April 1, 1997, the date the calculation for unlawful presence begins, until his deportation on April 6, 2000.

The record further reflects that the applicant and his spouse have two children born in the United States.

The record includes a psychological evaluation of the applicant's spouse dated November 11, 2000 and a follow-up dated October 22, 2001. The evaluations indicate that the spouse is experiencing signs and symptoms of depression in reaction to the applicant's deportation. In addition, separation from her spouse has caused her significant financial stress and the couple's children are suffering from the lack of fathering.

The applicant's equities in this matter include his family ties as the spouse and father of United States citizens. The favorable factors include the applicant's family responsibilities, as well as the emotional and financial hardships his family has faced since his removal.

The unfavorable factors in this matter include the applicant's history of immigration violations including his procuring admission into the United States by fraud in 1993, his remaining without Bureau authorization after that fraudulent entry, the fact that he did not appear for his deportation hearing and was ordered deported *in absentia*, his unlawful presence subsequent to the immigration judge's order, and the fact that he entered into his marriage subsequent to an order of deportation.

The applicant's actions in this matter cannot be condoned. His equity (marriage) gained after having been ordered excluded and deported from the United States can be given only minimal weight. The applicant has not established by supporting evidence that the favorable factors outweigh the unfavorable ones.

In discretionary matters, the applicant bears the full burden of proving eligibility in terms of equities in the United States that are not outweighed by adverse factors. See *Matter of T-S-Y-*, 7 I&N Dec. 582 (BIA 1957); *Matter of Ducret*, 15 I&N Dec. 620 (BIA 1976). After a careful review of the record, it is concluded that the applicant has failed to establish that he warrants the favorable exercise of the Attorney General's discretion. Accordingly, the decision of the officer in charge to deny the Form I-212 application will be affirmed and the appeal dismissed.

ORDER: The appeal of the denial of the applicant's Form I-212 is dismissed and the decision to deny the Form I-601 is withdrawn.